UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

KAPSTONE PAPER AND PACKAGING CORPORATION

and **Case 19–CA–188182**

ASSOCIATION OF WESTERN PULP AND PAPER WORKERS LOCAL 153, AFFILIATED WITH THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA

Irene H. Botero and J. Dwight Tom, Esqs., for the General Counsel.

James M. Shore, Esq. (Stoel Rives, LLP),
for Respondent Kapstone Paper and Packaging Corporation.

DECISION

STATEMENT OF THE CASE

MARA-LOUISE ANZALONE, Administrative Law Judge. I heard this case on May 2 and 3, 2017, in Portland, Oregon. This case was tried following the issuance of a Complaint and Notice of Hearing (the complaint) by the Regional Director for Region 19 of the National Labor Relations Board on February 27, 2017. The complaint was based on an original and amended unfair labor practice charge filed by Charging Party Association of Western Pulp and Paper Workers Local 153, affiliated with the United Brotherhood of Carpenters and Joiners of America (Charging Party, the Union or Local 153). The General Counsel alleges that Respondent Kapstone Paper and Packaging Corporation (Respondent or Kapstone) violated Sections 8(a)(1) and 8(a)(3) and of the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, et. seq. (the Act), by unlawfully interrogating and disciplining employee Dave Wendel (Wendel). Respondent filed a timely answer to the complaint denying the commission of the alleged unfair labor practices.

At trial, all parties were afforded the right to call, examine, and cross-examine witnesses, to present any relevant documentary evidence, to argue their respective legal positions orally, and to file post-hearing briefs.[1] Post-hearing briefs were filed by the General Counsel and

[1] Abbreviations used in this decision are as follows: "Tr." for transcript; "GC Exh.__" for General Counsel's Exhibit; "R. Exh. __" for Respondent's Exhibit; "Jt. Exh. __" for Joint Exhibit; "GC Br. at __" for the General Counsel's post-hearing brief; and "R. Br. at __" for Respondent's post-hearing brief.

Respondent, and have been carefully considered. Accordingly, based upon the entire record herein, including the post-hearing briefs and my observation of the credibility of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges that Respondent, a Delaware corporation, is engaged in the business of operating a paper and pulp mill in Longview, Washington. The complaint alleges and Respondent admits that, during the calendar year preceding the compliant, it purchased and received at its Longview, Washington facility goods valued in excess of $50,000 from points outside the State of Washington. Accordingly, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. The complaint further alleges and Respondent admits that, at all material times, Local 153 has been a labor organization within the meaning of Section 2(5) of the Act.

Based on the foregoing, I find that this dispute affects commerce and that the National Labor Relations Board (the Board) has jurisdiction of this case, pursuant to Section 10(a) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

This case involves Respondent's treatment of pipefitter/shift machanic Wendel, who is employed at its Longview, Washington pulp and paper mill (the Mill). The General Counsel contends that Respondent issued an unwarranted "letter of reprimand" to Wendel in violation of Section 8(a)(3) of the Act, based on his union activities, and additionally subjected him to unlawful interrogation about such activities in violation of Section 8(a)(1) of the Act. Respondent denies all allegations and asserts that Wendel's discipline was based on his poor work performance.

A. Factual Background

1. Respondent's Portland operation and Wendel's role in Local 153

The Mill employs approximately 700 union-represented employees, including Wendel (the unit); at all relevant times, the parties operated under a collective-bargaining agreement which expired in 2014. Wendel's direct supervisor at the Mill is Kody Brinson (Brinson), who reports in turn to Mechanical Superintendent Mike Foust (Foust). Respondent's top-level manager overseeing operations is Mill Manager Paul Duncan (Duncan). (Tr. 101, 108, 121–122, 312–313, 492, 539–540) Duncan, who made the final decision to discipline Wendel, did not testify.

Wendel is assigned to a maintenance crew at the Mill; his duties include troubleshooting, diagnosing and repairing the Mill's piping and hydraulic mechanical systems. A typical maintenance crew includes 2 pipefitter/shift mechanics, 2 millwrights, 2 electricians and an instrument technician. Each pair of craft workers functions as a team (work team) and receives assignments as such from the shift's lead person, typically by phone, radio or in-person; these assignments are generated from work orders issued by any of the approximately 100 individuals

assigned to a shift, including supervisors. (Tr. 39–40, 47–48, 139–140, 157–158, 177, 190–192, 438)

It is undisputed that Wendel served in various roles within the Local 153 during the relevant time period, including serving as Financial Secretary, shop steward, bargaining committee member and joint labor/management committee representative. In August 2015, the unit employees went on strike for approximately 10 days, during which time Wendel served as a strike team captain. (Tr. 41–42, 45, 46, 108–109, 231, 493, 523)

2. Respondent's work rules and practices

Respondent's work rules and guidelines for discipline are set forth in the "Mill Rules," which establish the minimum level of discipline Respondent applies to specific infractions. (Tr. 316; R. Exh. 3) Respondent investigates work performance issues by holding "fact finding meetings," in which employees are interviewed with union representation present. Witnesses, including Gaston, consistently testified that Respondent typically investigates the performance of a two-person work team as a whole, and that singling out a member of a work team for a fact-finding is the exception, not the rule. Likewise, Respondent's practice is to discipline both team members for failure to adequately perform a task assigned to them collectively. In this regard, Nicholas Boehler (Boehler), a Local 153 representative charged with resolving disciplinary situations, could not recall any situation (other than Wendel's letter of reprimand) in which only one member of the team was investigated and disciplined over a task assigned to the team collectively. (Tr. 102, 270, 280–281) Respondent offered no evidence to the contrary.

Respondent follows a progressive discipline policy under which each additional infraction results in a higher level of discipline (regardless of whether it is based on violation of a different rule). That said, Respondent may skip one or more levels of discipline and issue an "accelerated discipline." According to Respondent's Human Resources Director Matthew Gaston (Gaston), this happens only sporadically. (Tr. 320, 496–497) It is undisputed that, pursuant to Respondent's progressive disciplinary policy, Wendel's November 6 letter of reprimand constituted an accelerated discipline, as it effectively skipped the prior, "record of reprimand" level of discipline.[2]

3. Policies regarding conducting union business

Also relevant to this case are the parties' rules and past practice regarding the performance of shop steward duties while on the clock. In this regard, the parties' collective-bargaining agreement includes a requirement that certain Local 153 officials secure advance permission from management before talking to a unit member during working hours. These provisions, however, do not apply to stewards such as Wendel. (R. Exh. 1) In fact, both Wendel and 20-year union steward Brenda Small (Small) credibly testified there is no rule at the Mill requiring that shop stewards seek approval for verbal interactions with unit members, and Respondent offered no evidence to the contrary. According to Wendel, his historical practice has been to carry out his shop steward duties (including answering questions for unit employees) openly in

[2] As of October 20, Wendel had received a formal counseling (issued by Brinson in July 2016) after he was spotted using his cell phone while driving into the Mill's parking lot in violation of the Mill Rules. (Tr. 324, GC Exh. 14(a), (b), R. Exh. 4)

front of supervisors on the shop floor.[3] Brinson (Wendel's direct supervisor) did not deny this, and also admitted that Wendel had never asked him for permission to conduct union business for "a few minutes here and there." (Tr. 103–104, 166–167, 229, 247, 432)

4. The events of October 20, 2016[4]

Each of the performance issues relied upon by Respondent for disciplining Wendel occurred on October 20. Wendel, who has 17 years' experience as a journeyman pipefitter, was teamed up that day with fellow journeyman-pipefitter Fred Manke (Manke). Manke, who holds no official position with the Local 153, has significantly less (under 5 years') experience than Wendel and was functioning in a relief capacity that day. Mark Watenpaugh (Watenpaugh) served as the shift's lead person responsible for relaying work orders. Supervising the approximately 30 shift employees was Brinson. (Tr. 104, 115, 127, 158, 175–176; 189–191, 220, 357)

What follows is a summary of the day's events, organized around the various work Wendel and Manke were assigned:

a. First assignment: replace a wash-up hose

Wendel and Manke each testified that Watenpaugh relayed their first assignment at approximately 10 a.m.—they were to repair a wash-up hose connected to one of the Mill's paper making machines (referred to as PM 10).[5] Before they left to perform this task, Wendel was approached by a bargaining unit employee, who stated that he was concerned about being discharged. Meanwhile, Manke inspected the hose in question and then returned, informing Wendel that it was severely damaged and required replacement. While Wendel relayed the employee's report to a Local 153 official, Manke replaced the hose; he left the repair incomplete, however, in that he did not replace the hose's rack. In total, Wendel spent approximately 30 minutes on union business. (Tr. 49, 52, 54–55, 193–194; R. Exh. 8)

b. Second assignment: move a heat exchanger and oil filter components

Shortly after dispatching the team's first assignment, Watenpaugh gave them another one. This time, they were to move a heat exchanger and certain oil filter components from another paper machine (called PM 11) to PM 10. Wendel and Manke each testified that the assignment, as relayed by Watenpaugh, was vague and not identified as having any particular urgency or priority; they were simply to contact employee Mike Catlin (Catlin) about "something that needed to be moved."[6] This assignment was based on a work order verbally communicated to

[3] Small likewise testified she regularly conducts union business on the clock without seeking any advance approval, including answering questions from unit members in the presence of management. (Tr. 228–230)

[4] Unless otherwise noted, all dates herein refer to the year 2016.

[5] Watenpaugh, who retired in early 2017, did not recall relaying this assignment. Considering that he testified nearly 7 months after October 20 (a day which reasonably would have held no particular significance to him), I do not believe he deliberately falsified his testimony in this regard, but honestly forgot about assigning the work.

[6] Catlin, like Manke, holds no official position with the Union.

Watenpaugh by Brinson; however, both Wendel and Manke credibly testified that Watenpaugh did not inform them of this. (Tr. 158–159, 192–193, 218–219, 224, 359)[7]

While Manke was still working on the hose assignment, Wendel completed his Local 153 business and left Catlin a voice-mail message. By the time Manke returned from the hose repair job (about 11 a.m.), Catlin had not returned this message, so the two men took their half-hour lunchbreak. About an hour later, Wendel left another voice-mail for Catlin. He also spotted Watenpaugh and told him that he had still not heard back from Catlin, and Watenpaugh responded, "I don't know what else you can do." Brinson, for his part, testified that he had been attempting, around the same time, to track down Wendel and Manke. According to him, these "tracking" efforts consisted of him dropping in on Watenpaugh to inquire about the team's whereabouts and confirming that they knew to contact him with questions.[8] There is no evidence, however, that Brinson made any effort to contact Wendel or Manke directly via radio, despite unrebutted testimony that this was the standard manner for supervisors to stay abreast of a work team's whereabouts. (Tr. 50, 55–58, 104, 107–108, 193, 195–196, 222, 360)

Shortly after 1 p.m., Wendel and Manke finally located Catlin who then, in Brinson's words, "sidetracked" the team with work that had actually been assigned to another pipefitter. This appears to have been a mistake on Caitlin's part; although Wendel had informed him that he and Manke were supposed to work on an oil filter setup for PM 10, Catlin assumed that they had been sent to deal with a different problem—rerouting a water line to a new source. This, he informed them, was "what the problem was." Since Catlin's break time was scheduled to begin at 1:30 p.m., the three men agreed to regroup a half-hour later. While Catlin took his break, Wendel and Manke got started on the task of replacing the water source, which involved tracing a water line through miles of lines and pipes dating back 50 years. (Tr. 59–64, 252–255, 362)[9]

c. Brinson interrupts the team's work to confront Wendel

Around 2 p.m., Catlin rejoined the team, and the three men continued locating the water source. They were so engaged at 2:45 p.m., when Brinson arrived. Upset, he demanded to know what Wendel was working on. Wendel explained that they were assisting Catlin in locating a water source; Brinson then asked why it had taken the team so long to arrive at the machine and what they had worked on earlier in the day. Wendel responded that it had been "a slow morning" and that they had been assigned to replace a water hose. He then explained that he had been interrupted by union business involving talking to members, to which Brinson responded, "who was there, who was it?" Wendel responded, "I don't think I need to explain that to you." Brinson then asked, "well then what was it about?" to which Wendel responded that it was a private matter. Brinson then asked, "well then what did you do?" and Wendel indicated that he had talked to unnamed members. Brinson then asked how long that took, and Wendel stated that it was less than a half-hour. Notably, during this conversation, both Manke and Catlin—sensing Brinson's frustration—stepped away; Manke further explained that he was concerned about

[7] I do not credit Watenpaugh's testimony to the contrary. As noted, his ability to recall the events of October 20 nearly 7 months later (i.e., such as having assigned the team's first, hose replacement assignment) rendered his testimony generally unreliable as to more specific details.

[8] I do not credit this self-serving testimony, which went uncorroborated by Watenpaugh.

[9] Manke's recollection was slightly different than that of Wendel and Catlin, in that he remembered the three men looking for the cool water source together. I do not find this discrepancy material, however.

preserving the privacy of the unit member Wendel had assisted that morning. (Tr. 64–68, 109, 199–202, 255–259)

I have credited the testimony of Wendel as to the substance of this conversation. He answered questions without embellishing or exaggerating, and appeared to work hard to answer questions accurately and completely. In addition, he was corroborated by current employees Manke and Catlin, whose testimony was specific and detailed. I do not credit Brinson's version of the conversation; he became visibly nervous when questioned about it and, even under examination by his own counsel, gave conflicting answers as to what he asked Wendel.[10]

Following the discussion about how Wendel had spent his morning, Brinson asked him the team was currently doing. When Wendel explained that Catlin had instructed them to reroute a water line, Brinson responded that this was not the job he had ordered and directed them to begin working on their actual, second assignment: transferring components to PM 10. Brinson left, and Wendel and Manke proceeded to work on this task. By approximately 3 p.m., they had partially completed the task. (Tr. 69–73)

d. Brinson conducts a fact finding meeting over Wendel's performance

Shortly after 3 p.m., Brinson radioed Wendel and instructed him to come to his office. Present, in addition to Brinson and Wendel, were Local 153 steward Small and Supervisor Dan Cripe. Manke also appeared, assuming that—as Wendel's team member—he had been summoned as well, but he was told to return to work.[11] As noted, singling out Wendel for a fact finding under such circumstances was highly unusual; neither Labor Relations Manager Gaston or Union Representative Boehler could recall any other situation in which only one member of the team was investigated over a task assigned to the team collectively. (Tr. 73–74, 102, 203–204, 270, 280–281, 313, 374, 376, 534)[12]

Brinson took the lead, instructing Wendel to account for his day up to that point "minute by minute." Small could not recall ever attending a fact-finding meeting involving such a granular inquiry into an employee's entire shift. As Wendel recounted the team's activities, Brinson critiqued, noting, for example, that he had inspected the hose replacement and it was not complete. When Wendel mentioned that he had been interrupted by Local 153 business, Brinson asked how long that business had taken; as before, Wendel responded that it had taken less than a

[10] He first testified that the only question he "may have" asked about Wendel's union business was how long it took; minutes later he said he wasn't sure but may have also asked where the union business took place. He also insisted that he did not ask Wendel to identify which employee(s) were involved in the business, but that "it came up. I don't know if he offered it…" (Tr. 370) Overall, he struck me as casting around for the "right" answer, not the truth.

[11] Asked why he appeared at Brinson's office along with Wendel, Manke stated simply, "[w]e were partnered up." (Tr. 203–204)

[12] According to Brinson, he held this meeting at the "suggestion" of his supervisor, Michael Foust, but that he personally agreed that it was the right course; Foust, however, did not testify to corroborate this.

half-hour.[13] Brinson then asked Wendel if he had sought permission from a supervisor before conducting his union business, and Wendel said no. Brinson then said that Wendel needed to let his supervisor know if he were going to conduct union business as a shop steward. (Tr. 6, 75–77, 232–233, 235, 386–387, 414–415; R. Exh. 6, 8)[14]

The conversation then changed to the team's work on PM 10, and Brinson accused Wendel of deliberately delaying the team's work. Wendel assured Brinson that he had not engaged in any intentional delay and had in fact twice attempted to contact Catlin. He added that Catlin's failure to respond, and not his own union business, had caused the delay in the team performing its second assignment. Brinson demanded, "why didn't you call me?" to which Wendel responded that he had no idea that Brinson was involved in the team's assignment or had any information about it. Brinson next questioned why, even after Catlin had misdirected them to locate a cool water source, it took them so long to do so. All that was necessary, he stated, was to "open the line" and check that the water was clear and cold. (R. Exh. 6; Tr. 81, 234)

Finally, they discussed the work the team was currently performing (i.e., hooking up a water source for the filter panel they had transferred to PM 10). Brinson told Wendel about a water source he had already identified, but Wendel suggested that he knew of one closer to the filter panel. Brinson responded that he didn't care which water source was used, "as long as it is cold."[15] Shortly after the meeting concluded, Brinson sent an email forwarding his meeting notes to his supervisor Foust, as well as Gaston in Human Resources, stating "[i]t doesn't look like this will go anywhere but I'll ask some other folks some questions." At hearing, Brinson did not explain what he meant by this remark. Despite his announced intention to question additional people, Brinson never interviewed anyone besides Wendel about what happened on October 20. (Tr. 66, 77–78, 80–81, 92–93, 208, 394, 404, 457–458; R. Exh. 7)

e. The team continues its work and Brinson interrupts with a new assignment

Following the fact-finding meeting, Wendel rejoined Manke at PM 10, where they continued to work on transferring the filter panel from PM 11. Per Brinson's instructions, they located a temporary water source for the machine and connected to it. As Manke testified, they let the water run for a little while and then tested it by hand to ensure that it was cold water. At approximately 5:15 p.m., Brinson returned to the jobsite and announced that he wanted a corroded hose replaced on the machine.[16] By the time their shift ended, Wendel and Manke were

[13] I do not credit Wendel's recollection that, during this meeting, Brinson again demanded to know who was involved in his Local 153 business. Small directly contradicted him on this point, and Brinson and Cripe were each vehement in their denial that any such questioning occurred. I find it more likely that, in recounting his shop-floor discussion with Brinson, Wendel proactively stated that he did not want to discuss the details of his activity or who was involved. See R. Exh. 6; GC Exh. 16.

[14] While the record evidence revealed that Respondent had never before required a union steward to provide such notification, the complaint does not allege that this pronouncement amounted to an unlawful rule.

[15] Although Brinson claimed to have earlier told Wendel that he wanted a specific water source used, neither he nor Cripe denied that he later acquiesced to Wendel on this point during the fact-finding meeting.

[16] According to Respondent, Brinson specifically instructed Wendel that he wanted the hose replaced "immediately." Brinson provided only lukewarm testimonial support for this contention; at most, he seems to have suggested that it would be expedient to perform that task at the time. (Tr. 401–402)

just completing their second assignment (installing the filter system). After inspecting the hose himself, Wendel determined that it was functional and therefore the team's time would be best spent completing the installation instead. (Tr. 82–83, 208–209, 399)

At the shift change, Wendel and Manke did not complete a shift log, but instead notified the next shift's lead that Brinson wanted the extra hose to be replaced that night. They also notified him of the status of their unstarted, third assignment of the day (dealing with a pump of some kind). According to the testimony of Wendel, as well as Manke, while employees are expected to update the next shift of the status of their assignments and any unfinished tasks, it is acceptable to do so verbally, and no employee (other than Wendel) has ever been disciplined for failing to complete a shift log. (Tr. 85, 103, 134–135, 207–208, 217)

Unbeknownst to Wendel and Manke, the filtration system they installed bypassed a necessary pressure switch (Brinson had admittedly failed to inform them that they were to include one). This oversight did not damage the machine, but simply triggered it to shut down until the next shift's pipefitters fixed the problem. According to Respondent, this mistake rendered the machine "inoperable for many hours." See R. Br. at 14. There is, however, no credible record evidence to support this contention.[17] Two days later, on October 22, Brinson learned that the temporary water source Wendel and Manke had hooked up to PM 10 was not cold, as he had directed, but rather provided hot, recycled water. While the use of such a water source may have affected PM 10's efficiency, it did not render the machine inoperable or damage it. (Tr. 216, 354–355, 409, 411–412, 442–443, 464–466)

5. Brinson conducts a supplemental fact-finding on October 27

Seven days following Wendel's original fact-finding, he (without Manke) was called to attend an additional meeting regarding the events of October 20.[18] Again present were Brinson, Small and Cripe. Brinson began the meeting by thanking Wendel for completing the team's first assignment on October 20 by replacing the hose rack as instructed, at which point Wendel pointed out that Manke, not he, had performed the original work on the hose.[19] He next accused Wendel of improperly bypassing a pressure switch in installing the filter system on PM 10, and using a hot water source on the machine. Wendel defended the team's work on both counts, stating that they were unaware of the pressure switch, which was hidden by paper stock (i.e., runoff) and that they had followed Brinson's own instructions for checking the temperature of the water source. Small jumped in at this point, insisting that Wendel had in fact followed the

[17] Although admitting that he believed the pressure switch problem to have been fixed "that night" (i.e., the evening of October 20), Brinson nonetheless offered the following confusing conjecture: "I think that night -- the system was still not running right after twelve hours of still not running." (Tr. 412) Notably, Respondent offered no witness with first-hand knowledge as to what took place after Wendel and Manke's shift ended.

[18] According to Gaston, the second fact-finding meeting was his idea, in that he wanted to ensure that Wendel had the opportunity to explain certain of his performance that had not been discussed in the first fact-finding meeting. (Tr. 516–517) I frankly found this testimony coached; it appeared (like the claim that the first fact finding was not Brinson's idea) to be yet another attempt to distance Brinson, who questioned Wendel about his Local 153 business, from the process that led to his discipline.

[19] Based on his tendency to describe the team's collective work, I find no merit to Respondent's contention that Wendel had, in the earlier fact-finding meeting, attempted to insinuate that he—and not Manke—had replaced the hose.

water temperature testing method Brinson had directed in the prior fact-finding meeting. The discussion became heated and finally Cripe intervened, stating "this is going to go nowhere…we need to agree to disagree." (Tr. 90–93, 237–238, 516–517)

It is undisputed that Respondent held no fact-finding meeting with Manke, or otherwise questioned him regarding the events of October 20. At hearing, Brinson testified in awkward, rehearsed fashion that this was because Manke was significantly junior to Wendel and only working in a relief capacity on the shift. Gaston, for his part, delivered an embellished, if somewhat rambling, version of this rationale. (Tr. 394–395, 538–539) Based on their demeanor as well as the record as a whole, I cannot credit either man's testimony on this point.

6. Respondent issues Wendel an "accelerated discipline"

On November 8, Wendel was issued a letter of reprimand regarding his conduct on October 20. As noted, it is undisputed that the discipline issued to Wendel was accelerated, in that it skipped a level of progressive discipline. Respondent's witnesses were less than forthcoming about *who* made the decision to issue Wendel discipline. Brinson claimed to know only that it was not his. Gaston—a high-level labor relations official of Respondent—explained that he was consulted on the decision based on its "sensitivity" due to Wendel being a member of the Union's bargaining committee. Gaston eventually testified—after what can only be described as a tortured attempt *not* to identify the final decision maker—that in fact Mill Manager Duncan was responsible. Duncan, who remained Mill Manager as of the last day of hearing in this matter, did not testify. (Tr. 417–418, 427–431, 491, 519–520, 539–540)

The stated reasons for Wendel's accelerated discipline were failure to adequately perform job duties and abuse of discretionary time. With respect to job performance, the letter cited Wendel's bypassing the pressure switch on PM 10, failure to use a cold water source and failure to complete the 5:15 p.m. hose replacement job. As to the abuse of discretionary time, the letter accused Wendel of failing for 3 hours to begin his second assignment (transferring the filter panel to PM 10), instead spending this time, in part, performing the first (hose replacement) assignment and conducting union business. With respect to the latter, the letter stated "you ultimately acknowledged that you didn't have approval to conduct Union business at that time."[20] Finally, the letter accused Wendel of not completing a shift log at the end of his October 20 shift. (GC Exh. 4)

Respondent provided several examples of accelerated discipline, the bulk of which were based on safety violations, damage to machinery or a significant loss of production. (R. Exh. 9; Tr. 499–505) Only a single accelerated discipline (other than Wendel's) involved an employee abusing discretionary time. That employee, however, was accused of repeatedly refusing a supervisor's direct order to assist a work crew during a particularly busy time in Mill operations. (R. Exh. 9(d); Tr. 503–504, 524) It is undisputed that neither Manke, Catlin or Watenpaugh received any discipline regarding the events of October 20, nor were any of them interviewed, coached or reprimanded in connection with the work Wendel and Manke were assigned that day.

[20] Despite the letter's explicit reference to Wendel's union business, both Brinson and Gaston insisted at hearing that they had "reconstructed" Wendel's unaccounted for time on October 20 in a manner that did not take the union business into account. I found this testimony highly rehearsed and unconvincing.

Approximately 2 weeks after Respondent issued Wendel the letter of discipline, he asked his direct supervisor Larry Case (Case) if he was really required to give advance notice before conducting union business on the clock; Case assured him that he did not. (Tr. 107–108, 218–219)

ANALYSIS

A. Credibility

Certain of my findings are based on witness credibility. A credibility determination may rest on various factors, including "the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole." *Hills & Dales General Hospital*, 360 NLRB 611, 617 (2014), citing *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001). In making credibility resolutions, it is well established that the trier of fact may believe some, but not all, of a witness' testimony. *NLRB v. Universal Camera Corp.*, 179 F.2d 749 (2d Cir. 1950).

The Board recognizes the familiar rule that, "when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge." *International Automated Machines*, 285 NLRB 1122, 1123 (1987), enfd. 861 F.2d (6th Cir. 1988). This is particularly true where the witness is an agent of a party. *Roosevelt Mem. Med. Ctr.*, 348 NLRB 1016, 1022 (2006). Specifically, the Board will infer that such a witness, if called, "would have testified adversely to the party on that issue." Id.; see also *Flexsteel Industries*, *Inc.,* 316 NLRB 745, 758 (1995). In particular, the Board will not hesitate to draw an adverse inference from a respondent's failure to present the testimony of a decision maker as to his motive in taking the alleged discriminatory action. *Dorn's Transportation Co.*, *Inc.,* 168 NLRB 457, 460 (1967), enfd. 405 F.2d 706, 713 (2d Cir. 1969); *Vista del Sol Health Services, Inc.*, 363 NLRB No. 135, slip op. at 26 (2016); *The Southern New England Telephone Co*., 356 NLRB 883, 893–894 (2011); *Government Employees (IBPO)*, 327 NLRB 676, 699 (1999).

Where there is inconsistent evidence on a relevant point, my credibility findings are incorporated into my legal analysis below. I found the testimony of current employees Wendel, Catlin and Manke generally corroborative and credible, as discussed supra.[21] By contrast, I found the testimony of Respondent's witnesses—in particular, Brinson and Gaston—to be overly rehearsed and self-serving. More troubling was the failure of Respondent to offer the testimony of the individuals responsible for the decisions to investigate and discipline Wendel: Faust and Duncan. As set forth below, I find in particular that the failure elicit Duncan's testimony to have irreparably damaged Respondent's case.

[21] Testimony from current employees tends to be particularly reliable because it goes against their pecuniary interests. *Gold Standard Enterprises*, *Inc.,* 234 NLRB 618, 619 (1978); *Georgia Rug Mill*, 131 NLRB 1304, 1304 fn. 2 (1961); *Gateway Transportation Co.*, *Inc.,* 193 NLRB 47, 48 (1971); *Federal Stainless Sink Div. of Unarco Industries*, *Inc.,* 197 NLRB 489, 491 (1972).

B. Analysis of Individual Allegations

1. The October 20 alleged interrogation

The General Counsel alleges that Brinson violated Section 8(a)(1) of the Act when he demanded that Wendel identify the nature of the union business that took him away from his work on October 20, as well as the identity of the specific individuals who participated in it. I find that Brinson violated the Act as alleged.[22]

a. Applicable law

Section 8(a)(1) of the Act states, "It shall be an unfair labor practice for an employer (1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Section 7." It does not follow, however, that an employer's questioning of its employees regarding protected concerted activity constitute an unlawful interrogation per se. *Emery Worldwide*, 309 NLRB 185, 186 (1992). Instead, the Board's test considers the totality of the circumstances, including whether the questioning reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act. *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), enfd. sub nom. *HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). Consideration is appropriately given to the following factors (known as the *"Bourne"* factors, referring to the 1964 case):

> [w]hether there was a history of employer hostility or discrimination; the nature of the information sought (i.e., whether the interrogator was seeking information to base taking action against individual employees); the position of the questioner in the company hierarchy; the place and method of interrogation and the truthfulness of the reply.

See *Bourne v. NLRB,* 332 F.2d 47, 48 (2d Cir.). The *Bourne* factors should not be mechanically applied or used as a prerequisite to a finding of coercive questioning, but rather used as a starting point for assessing the totality of the circumstances. *Westwood Health Care Center*, 330 NLRB 935, 939 (2000). While the Board will also consider whether the interrogated employee is an open and active union supporter, it is generally considered coercive to inquire as to employees' union sentiments of employees, even when such inquiries are addressed to open and active union supporters in the absence of threats or promises. *Rossmore House*, supra (citing *PPG Industries, Inc.,* 251 NLRB 1146 (1980)).

[22] As noted, supra, I do not find that Brinson unlawfully questioned Wendel during the first fact-finding meeting; my finding of violation is based solely on the earlier conversation between Brinson and Wendel on the shop floor.

Nonetheless, as the Board recently reiterated, Section 7's prohibition on unlawful interrogation does not preclude an employer from lawfully questioning employees in an effort to investigate workplace misconduct—even where such misconduct allegedly took place during the exercise of Section 7 rights. See *St. Francis Regional Med. Ctr.*, 363 NLRB No. 69, slip op. at 1, fn. 2 (2015). However, in such circumstances:

> [t]he employer must avoid impinging on Sec. 7 rights by, among other things, tailoring the questions to address only the narrow facts surrounding the alleged misconduct, offering assurances against reprisals for protected activity, and avoiding probes into the motives for the protected activity.

Id. (citing *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12, slip op. at 8–9 (2014); *Bridgestone Firestone South Carolina*, 350 NLRB 526, 528–529 (2007); *Bourne, supra* at 48)).

b. Brinson's questioning constituted an unlawful interrogation

The evidence establishes, and I find, that Brinson unlawfully interrogated Wendel about the details of, and participants in, his union activity on October 20.

As a preliminary matter, Wendel's status as a steward does not, in itself, render Brinson's questioning noncoercive. See, e.g., *St. Francis Regional Medical Ctr.*, 363 NLRB No. 69, slip op. at 1, fn. 2 (2015) (questioning steward about her union activities unlawful). That said, I agree with Respondent that Brinson's relatively low supervisory status and the absence of historical antiunion animus argue detract from the coercive effect of his inquiries. These factors, however, are eclipsed by the highly sensitive nature of the information he sought. Indeed, Brinson's questions were aimed at the heart of Section 7 protected conduct, in that he demanded to know: (a) the identity of the employee or employees with whom Wendel had conducted "union business"; and (b) the very information they had discussed. This is "precisely the type of coercive action on the part of employers which employees are protected from by Section 8(a)(1) of the Act." *Custom Carpet Installations*, 225 NLRB 1036, 1038 (1976) (finding unlawful interrogation where steward was asked about his interactions with represented employees).

Respondent also argues that the exchange's shop-floor setting minimizes its coercive quality. I disagree, in particular because Brinson's questioning occurred in the presence of two other employees, each of whom responded by absenting themselves from the confrontation. As the Board has found, openly grilling a shop steward—in the presence of other employees—about his representational activities necessarily results in the "direct and immediate intimidation" of such employees. Id. I also disagree with Respondent that Brinson's questioning was limited to an effort to account for Wendel's time on October 20. Indeed, once Wendel informed him that he had spent approximately 20 minutes on his union business, Brinson (who never saw fit to interview anyone but Wendel regarding the events of October 20), simply had no need to know the details of, or participants in, that union business. In addition to exceeding the bounds of a legitimate, tailored inquiry into Wendel's use of discretionary time, Brinson also failed to offer him assurance—warranted under the circumstances—against reprisals for having engaged in union business. These factors rendered the questioning coercive. See *St. Francis Regional Medical Ctr.*, supra (finding unlawful interrogation where, under guise of investigating

misconduct, employer questioned steward, without assurances, about her investigation into a potential grievance).

2. November 8 accelerated discipline

The General Counsel alleges that Respondent singled out Wendel for an unwarranted accelerated discipline based on his role and conduct as a union steward in violation of Sections 8(a)(3) and (1) of the Act. Respondent claims that its treatment of Wendel was based on its legitimate concerns with his job performance on October 20, and that it acted in accordance with its past practice of accelerating discipline based on conduct similar to Wendel's. As set forth below, I agree with the General Counsel and find that Respondent violated the Act as alleged.

a. Applicable law

Section 8(a)(3) of the Act prohibits employers from discriminating in regard to an employee's "tenure of employment . . . to encourage or discourage membership in any labor organization." In this case, it is alleged that Respondent violated this prohibition by disciplining Wendel based on his identity as a union steward and specifically because he interrupted his work on October 20 to assist a unit member facing possible discharge.

In determining whether an employer unlawfully disciplined an employee, such as Wendel, because he engaged in union activity, the Board applies the test established in *Wright Line*.[23] Under this standard, the General Counsel must make an initial showing that a substantial or motivating factor in the employer's decision was the employee's union or other protected activity. *Pro-Spec Painting, Inc.*, 339 NLRB 946, 949 (2003). The elements commonly required to support such a showing are union or protected concerted activity by the employee, employer knowledge of that activity, and animus on the part of the employer. *Consolidated Bus Transit, Inc.*, 350 NLRB 1064, 1065 (2007), enfd. 577 F.3d 467 (2d Cir. 2009). If the General Counsel prevails, the burden shifts to the respondent to prove not only that it had a legitimate reason for issuing the discipline, but that it would have done so even in the absence of the employee's union conduct. Id. at 1066. An employer may not, however, prove this affirmative defense where the proffered reasons for discharge are merely pretextual. *Metropolitan Transportation Services, Inc.,* 351 NLRB 657, 659 (2007); *Brink's, Inc.*, 360 NLRB 1206, 1217 (2014).

Moreover, where discipline results from the results of an investigation launched based on an employee's protected conduct, it logically follows that the employer cannot maintain its *Wright Line* burden to establish that it would have disciplined an employee "absent" such protected conduct.[24] Put another way, "misconduct discovered during an investigation undertaken because of an employee's protected activity does not render the discharge lawful." *Kidde, Inc.*, 294, NLRB 840, 841, fn. 3 (1989); see also *Kut Rate Kid & Shop Kwik*, 246 NLRB 106, 121–122

[23] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983).

[24] The rationale for this well-established rule is that, under such circumstances, "if the employer had not unlawfully undertaken to investigate the employee, it would not have had a basis for [disciplining] him." See *National Association of Government Employees (IBPO)*, 327 NLRB 676, 700 (1999) (citations omitted). To hold otherwise would effectively reward the discriminatory act of pursuing the investigation for an unlawful reason. See id.

(1979); *Campbell "66" Express*, *Inc.,* 238 NLRB 953, 963 (1978), enf. denied 609 F.2d 312 (7th Cir. 1979).

b. Respondent unlawfully disciplined Wendel on November 8

As an initial matter, I find that Counsel for the General Counsel presented a prima facie case with respect to Wendel's discipline. There is no dispute that Wendel engaged in union activity when, on October 20, he assisted a unit employee facing potential discharge. See *H&M International Transportation, Inc.*, 363 NLRB No. 139, slip op. at 25 (2016), citing *Clara Barton Terrace Convalescent Center*, 225 NLRB 1028 (1976). Nor is there any question that Respondent was aware of this conduct; his failure to have obtained "approval" for his union activity was in fact explicitly noted in the letter of reprimand he was issued.

I find abundant evidence of animus in the discipline decision, including the following:

- The discipline itself emanated from an unlawful interrogation by Brinson into the nature of Wendel's union business on October 20.

- Brinson's admonition to Wendel in the first fact-finding meeting that he was required to get "permission" before conducting union business—a new rule apparently crafted for Wendel alone—suggests that Brinson took issue with Wendel's conduct as a steward.

- Respondent singled out Wendel for fact-finding and discipline even though other employees—including Manke, Catlin and Watenpaugh—were involved in various missteps, failures and miscommunications that affected the team's productivity and performance that day.

- Respondent broke with its past practice by holding a single member responsible for the performance of work assigned to him as a member of a journeyman work team.

The Board regularly relies on such evidence to infer animus. See, e.g., *Austal USA*, *LLC,* 356 NLRB 363, 364 (2010) (unlawful interrogation supports inference of animus); *Medic One, Inc.,* 331 NLRB 464, 475 (2000) (evidence of disparate treatment, departure from past practice and failure to investigate supports inference of animus). As such, I find that the General Counsel has established a prima facie case, and that the burden shifts to Respondent to prove that it would have disciplined Wendel even in the absence of his union conduct. Based on the preponderance of the evidence, I find that Respondent has failed to meet its burden in several respects.

First, Respondent inexplicably failed to introduce the evidence most critical to its defense: the testimony of its decision maker, Duncan, as to his legitimate, non-discriminatory motive in disciplining Wendel. While both Brinson and Gaston testified that they ignored his union activity in assessing his performance on October 20, neither of them offered any plausible explanation as to why his letter of reprimand explicitly referred to this supposed non-factor. With such a conspicuous, *Wright Line*-shaped gap in the record, Respondent's failure to call Duncan warrants drawing an adverse inference as to why he decided to issue the discipline. *Government Employees (IBPO)*, 327 NLRB at 699 (failure to call decision maker gives rise to

adverse inference, where respondent had burden under *Wright Line* to establish its belief that discriminatee had committed fraud); see also *Vista del Sol Health Services, Inc.*, 363 NLRB No. 135, slip op. at 26; *Dorn's Transportation*, *Co., Inc.,* 168 NLRB at 460; *The Southern New England Telephone Co*., 356 NLRB at 893–894.[25]

Second, even in the absence of such an inference, I would find that Respondent cannot meet its *Wright Line* burden because it is not entitled to rely on alleged misdeeds by Wendel only uncovered during an investigation it launched based on his conduct as a union steward. See *Kidde, Inc.*, 294, NLRB at 841, fn. 3; *Kut Rate Kid & Shop Kwik*, 246 NLRB at 121–122; *Campbell "66" Express*, *Inc.,* 238 NLRB at 963. In this regard, I am convinced that the two "fact findings" Brinson conducted were motivated by Wendel's admission that he had spent a portion of his October 20 shift working on Local 153 business. This is substantiated by Brinson's immediate and unvarnished reaction to Wendel's disclosure of his protected conduct—an unlawful interrogation about the nature of the union business and its participants. From that point on, Brinson acted not as a manager intent on uncovering the true cause of mistakes and delays during the shift but rather obsessed with making a case for disciplining a steward who had admitted to conducting union business without management permission, in violation of a rule recognized by Brinson alone.[26]

That Respondent failed to interview any witness other than Wendel also strongly suggests that the "fact findings" Brinson conducted were nothing more than a show trial to punish Wendel for acting in his role as a union steward. Indeed, Brinson's zeal to pin mistakes on Wendel meant ignoring the obvious roles that others had in the day's mishaps. Manke, like Wendel, bypassed the pressure switch and hooked PM 10 to warm, recycled water. In addition, he (not Wendel) failed to replace a hose rack as directed. Likewise, Watenpaugh failed to inform the team that Brinson was the contact for their second assignment. Finally, Catlin directly caused the bulk of the team's downtime by failing to respond to Wendel's calls, and then misdirecting them to work on the wrong project. Clearly, even cursory interviews of these three men would have established that they, too, were responsible for certain of the mishaps and mistakes for which Wendel alone was disciplined.

Finally, it is worth mention that, even ignoring Respondent's bias-triggered investigation and failure to present its decision maker-witness, I would find that the October 20 performance issues attributed to Wendel to be the stuff of rank pretext, as indicated by Respondent's actions in (a) singling out Wendel for investigation despite obvious signs that he was not the only person responsible for delaying and/or poorly executing the team's work that day; (b) failing to interview Manke, Catlin or Watenpaugh, each of whom could have corroborated portions of Wendel's account; (c) departing from its past practice by disciplining only one member of a

[25] Gaston's testimony that Duncan "agreed" with his recommendation to issue discipline—hearsay in any event—does not shed light on Duncan's motivation for doing so. See *Interstate Circuit v. United States*, 306 U.S. 208, 226 (1939) (observing that "the production of weak evidence when strong is available can lead to the conclusion that the strong would have been adverse").

[26] In this regard, I find it highly implausible that Brinson spent his morning trying to track down the team's physical location instead of simply calling them to check on the status of their work. Nor do I credit his uncorroborated testimony that he initiated the fact finding process on the suggestion of his supervisor, Foust.

work team based on the team's performance and (d) failing to adduce evidence of comparable accelerated discipline for minor delays and work errors such as those attributed to Wendel.

For the reasons set forth herein, I find that, based on the preponderance of the evidence, Respondent issued Wendel an accelerated discipline based on his union conduct.

CONCLUSIONS OF LAW

1. Respondent Kapstone Paper and Packaging Corporation is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By interrogating employees about their union activities and the union activities of others, Respondent Kapstone Paper and Packaging Corporation has engaged in unfair labor practices affecting commerce within the meaning of 8(a)(1) of the Act.

3. By issuing an accelerated discipline to employee David Wendel for engaging in union and other protected conduct, Respondent Kapstone Paper and Packaging Corporation has engaged in unfair labor practices affecting commerce within the meaning of 8(a)(3) and (1) of the Act.

4. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent violated Section 8(a)(1) and (3) of the Act, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Having interrogating its employees regarding their union and other protected activity and the union and other protected activities of others, Respondent will be ordered to cease and desist from these actions. Having unlawfully disciplined employee Dave Wendel, Respondent be required to restore the status quo ante by rescinding his unlawful letter of reprimand and removing all references to it from Respondent's files.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[27]

ORDER

Respondent Kapstone Paper and Packaging Corporation, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Asking employees about their union activities or the union activities of others;

[27] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Disciplining employees because of their union or other protected activities; and

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

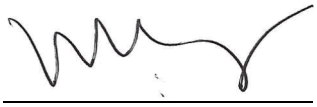
(a) Within 14 days' of the date of the Board's Order, remove from its files all references to Dave Wendel's November 8, 2016 letter of reprimand, and, notify him in writing that this has been done and that the letter of reprimand will not be used against him in any way; and

(b) Within 14 days after service by the Region, post at Respondent's Longview, Washington facility copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed its Longview, Washington facility, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at its Longview, Washington facility at any time since October 20, 2016.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 19 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

It is further ordered that the complaint allegations are dismissed insofar as they allege violations of the Act not specifically found.

Dated: Washington, D.C., November 8, 2017.



Mara-Louise Anzalone
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefits and protection
Choose not to engage in any of these protected activities

WE WILL NOT do anything that interferes with these rights. Specifically:

WE WILL NOT interrogate you about your involvement in union or other protected, concerted activities, or the union or other protected, concerted activities of other employees.

WE WILL NOT discipline you because of your union or other protected activities.

WE WILL remove from our files all references to Dave Wendel's November 8, 2016 Letter of Reprimand and WE WILL notify him in writing that this has been done and that the Letter of Reprimand will not be used against him in any way.

KAPSTONE PAPER AND
PACKAGING CORPORATION
(Employer)

Dated_____ By: _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

915 2nd Avenue, Federal Building, Room 2948

Seattle, Washington 98174-1078
Hours: 8:15 a.m. to 4:45 p.m.
206-220-6300

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/19-CA-188182 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 415-356-5130